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In the Supreme Court of the United States

OCTOBER TERM, 1986

DONALD P. HODEL, SECRETARY OF THE INTERIOR; and THE UNITED STATES DEPARTMENT OF THE INTERIOR, and AMOCO PRODUCTION COMPANY, et al.,

Petitioners,

vs.

PEOPLE OF THE VILLAGE OF GAMBELL, et al.,

Respondents.

AMICUS BRIEF OF NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, ENVIRONMENTAL DEFENSE FUND, NATIONAL AUDUBON SOCIETY, WILDERNESS SOCIETY, ENVIRONMENTAL POLICY INSTITUTE, TRUSTEES FOR ALASKA, NORTHWEST COALITION FOR ALTERNATIVES TO PESTICIDES, and OREGON NATURAL RESOURCES COUNCIL

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ISSUE PRESENTED

Did the Court of Appeals err by ordering that the Department of Interior be enjoined from proceeding with a lease sale in violation of a nondiscretionary duty imposed by Congress in section 810(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3120(a)?

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STATEMENT OF INTEREST OF AMICI CURIAE*

Amici Curiae are non-profit, public interest organizations whose purpose in part is to monitor the activities of federal agencies for compliance with environmental laws. Amici regularly seek redress in federal courts for agency violations of these laws. Injunctive relief is the principal remedy sought in such cases, and Amici are therefore vitally interested in this Court's rules of decision for granting or denying injunctive relief in cases involving statutory volations by federal agencies.

SUMMARY OF ARGUMENT

Petitioner Hodel in this case failed to comply with the nondiscretionary procedural obligations of section 810(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 1320(a). Under section 810(a) Hodel must evaluate the impacts of oil exploration and development on subsistence uses of public lands prior to leasing those lands. Petitioner Hodel failed to comply with this nondiscretionary duty.

This Court has long recognized Congress "may intervene and guide or control the exercise of the courts' discretion," provided Congress does so "in so many words, or by a necessary and inescapable inference. . . ." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) *quoting Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). When Congress imposes nondiscretionary duties on federal

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*All parties have consented in writing to the participation of these *amici* pursuant to Rule 36, Revised Rules of the Supreme Court. This brief is filed in support of the position of Respondents Village of Gambell, *et al.* This brief addresses only the propriety of the injunctive relief granted by the Court of Appeals in this case.

agencies Congress "by necessary inference" restricts the discretion of courts presented with violations of those duties. An agency's violation of a nondiscretionary duty constitutes irreparable injury which must be enjoined unless to do so would create a result contrary to the statute imposing the duty.

The Court of Appeals examined the language, purpose, and structure of section 810(a) of ANILCA to determine the appropriateness of injunctive relief in this case. Section 810(a) of ANILCA imposes a nondiscretionary duty upon the Secretary of the Interior to evaluate the impacts of oil exploration and development on subsistence uses of public lands prior to leasing. That duty was not fulfilled in this case. The court therefore properly remanded the case to the district court because the district court failed to account for the irreparable injury flowing from the violation of section 810(a).

The nondiscretionary duty imposed by section 810(a) of ANILCA is analogous to the duty imposed on federal agencies by section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536. In *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), this Court concluded that it was compelled to enjoin violations of section 7 because injunctions were the only way to ensure compliance. In the circumstances of this case, injunctive relief is also the only method of insuring compliance with section 810(a) of ANILCA.

Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982), upon which petitioners rely, supports the Court of Appeals' decision in this case. *Weinberger* recognized that courts' equitable discretion may be controlled by Congress, and that close scrutiny of the purpose and structure of applicable statutes is necessary to determine the degree to which Congress has restricted that discretion. The

Court in *Weinberger* concluded that courts may deny injunctive relief for violations of the permit requirements of the Clean Water Act, 33 U.S.C. § 1342, because (1) there are alternative ways to enforce the Act, (2) the permit process is a means to an end and the lack of a permit is not *per se* inconsistent with the Act's substantive goals, and (3) the exercise of equitable discretion was consistent with the "phased-compliance" scheme of the Act. None of these features is present in section 810(a) of ANILCA.

The constitutional doctrines of separation of powers and checks and balances also support the Court of Appeals' conclusion that an injunction is required in this case. In *Weinberger*, section 402 of the Clean Water Act regulated the federal defendant as it would have regulated a private sector polluter. In contrast section 810(a) of ANILCA is directed exclusively at federal agencies and is intended to guide and restrict their exercise of delegated power. It is the Court's role to enforce Congress' limitations on delegated power so long as those delegations are constitutional.

This Court has upheld delegations of power to agencies against separation of powers challenges in part because such delegations have been accompanied by provisions that guide the exercise of that power. It would be anomalous for the Court, having previously found that Congress is constitutionally compelled to provide guidance for the exercise of delegated power, to conclude that courts may refuse to enforce such guidance without themselves violating separation of powers principles.

If the Court fails to enjoin defendant's violation of its nondiscretionary duty under section 810(a), defendant will accrue power not delegated by Congress, and Congressional

power to check the authority of Executive branch agencies will be diluted. The Court will have neglected its own constitutional responsibility to enforce the checks placed by Congress on delegated powers, and will have facilitated the unauthorized exercise of power by a coordinate branch of the federal government.

I

THE COURT OF APPEALS' OPINION IN THIS CASE IS CONSISTENT WITH THE PURPOSES OF § 810(a) OF THE ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT (ANILCA)

The Court of Appeals in this case found that "[a]n injunction is the appropriate remedy for a substantive [sic] procedural violation of an environmental statute." *Village of Gambell v. Hodel*, 774 F.2d 1414, 1422 (9th Cir. 1986).[1] The court recognized that injunctive relief might not be appropriate in the unusual case where such relief would contravene the purposes of a statute, but concluded that in this case the defendant's violation of the nondiscretionary duty imposed by section 810(a) of ANILCA, must be enjoined because it violated "clearly expressed Congressional intent. . . ."[2] 774 F.2d at 1426. The court

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1. The word "substantive" should be "substantial," as it is in the opinion the court cites as the source of the rule. *See Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985).

2. When injunctive relief would create a result inconsistent with the purposes of a statute, a court's refusal to issue an injunction is consistent with its constitutional obligation to see that Congressional intent is carried out. *See e.g., American Motorcycle Association v. Watt*, 714 F.2d 962 (9th Cir. 1983) (injunction against enforcement of ordinance would allow race to proceed and cause harm to the environment); *Alpine Lakes Pro-*

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properly avoided speculation about whether compliance with section 810(a)'s procedures would have produced a particular result, and instead found that: " 'Irreparable damage is presumed when an agency fails to [follow procedures required by law].' " 774 F.2d at 1423 (*quoting Save Our ecoSystems v. Clark*, 747 F.2d 1240, 1250 (9th Cir. 1984)). Since the district court had failed to account for the fact that an agency's violation of a nondiscretionary procedural obligation may itself cause irreparable injury to plaintiffs by undermining the decision-making process and the Constitution's distribution of federal power, the court of appeals remanded for entry of a preliminary injunction.[3]

In *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982), this Court found that Congress, through the "purpose and language" of an Act, "may intervene and guide or control the exercise of the courts' discretion. . . ." An analysis of section 810(a) of ANILCA reveals that Congress did not intend to allow any exceptions to the mandatory requirements of the section, and therefore necessarily restricted the equitable discretion of courts presented with a violation of the section.

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tection Society v. Schlapfer, 518 F.2d 1089, 1090 (9th Cir. 1975) (injunction against timber harvesting of infected trees would result in more trees being infected—a result inconsistent with environmental protection purposes of NEPA).

3. This case involves a preliminary injunction and technically no final determination on the merits has been reached. But the Court of Appeals' decision on the likelihood of success is unequivocal; the defendant has violated the statute as interpreted by the Court of Appeals. Petitioner Hodel candidly admits that the Court of Appeals' decision in this case is final (brief of Hodel at 25 n.14) and in fact has been given precedential effect in *Tribal Village of Akutan v. Hodel*, 788 F.2d 1567 (9th Cir. 1986). For purposes of determining appropriate relief, therefore, the case should be viewed as having been decided on the merits.

A. Section 810(a) Imposes A Nondiscretionary Duty Analogous To That Imposed By Section 7 Of The Endangered Species Act

In concluding that an injunction was necessary based on the facts in the instant case, the court of appeals properly examined the purposes and structure of section 310(a) of ANILCA. Section 810(a) imposes a nondiscretionary duty upon the Secretary of the Interior to evaluate the impacts of oil exploration and development on subsistence uses of the public lands prior to leasing. It provides in relevant part:

> In determining whether to . . . lease . . . public lands under any provision of law authorizing such actions,[4] the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes.

If the relevant agency finds that a proposed lease may affect subsistence uses, the agency cannot proceed until the head of the agency:

> (1) gives notice to the appropriate State agency and the appropriate local committee and regional councils established pursuant to section 3115 of this title;
>
> (2) gives notice of, and holds, a hearing in the vicinity of the area involved; and

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4. The Secretary's authority to conduct the lease sales at issue in the instant case was delegated by Congress in the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356.

> (3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

16 U.S.C. § 1320(a).

The purpose of section 810(a) is to guide the exercise of previously delegated power. Congress intended in section 810(a) to insure that agencies fully consider subsistence needs prior to leasing decisions. The nondiscretionary duty imposed by section 810(a) is analogous to the nondiscretionary duty imposed on federal agencies by section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536, and addressed in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). Here, as with section 7 of the ESA, section 810(a) of ANILCA imposes an absolute duty: to evaluate impacts on subsistence uses, and to provide notice, hearings, and findings if significant impacts may occur. As this Court noted in *Weinberger*, the ESA "contains a flat ban on the destruction of critical habitats." 456 U.S. at 314. Once it was determined that completion of the Tellico dam would destroy critical habitat, the Court had no difficulty in concluding that "only an injunction would fulfill the objectives of the Act." *Id.* *See also Japan Whaling Assoc. v. American Cetacean Society*, 54 U.S.L.W. 4929, 4932 (June, 1986) ("The Secretary, of course, may not act contrary to the will of Congress when exercised within the bounds of the Constitution. If Congress has directly spoken to the precise issue in

question, if the intent of Congress is clear, that is the end of the matter."). The inference of Congressional intent to guide the exercise of judicial discretion is as necessary here as it was in *TVA v. Hill*. The court of appeals found that the appropriate way to vindicate the objectives of section 810(a) in this case is to enjoin the agency from proceeding until it has completed its section 810(a) analysis.

B. The Procedural Nature Of The Harm In This Case Supports The Imposition Of An Injunction

Hodel attempts to distinguish *TVA v. Hill* by arguing that "[b]y its very nature, a procedural requirement is ancillary to the substantive policy objectives of the statutes and . . . injunctive relief should [therefore] normally turn on the particular circumstances of the case." Brief of Hodel at 22. Hodel thus asks that courts be allowed to predict whether the procedural requirements that Congress imposed absolutely will in fact further the "substantive goals" of a statute in particular cases. Even if such predictions could be made, however, courts must respect Congress' choice of procedures. Procedures carry intrinsic value, and the constitutional implications of judicial second-guessing of those values are significant.[5] As the First Circuit stated with regard to another procedural statute:

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5. "When Congress has prohibited certain conduct, law-abiding citizens presumably refrain from that conduct voluntarily. The defendant in an injunction proceeding who asks the court to balance the remedies in [its] favor is, in effect, asking the court to approve of [its] decision not to comply with the duties that law-abiding citizens comply with voluntarily. Thus, the court is being asked to voice its approval of lawless conduct." Farber, *Equitable Discretion, Legal Duties, and Environmental Injunctions*, 16 Land Use and Environment L. Rev. 317, 339-40

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> NEPA is not designed to prevent all possible harm to the environment; it foresees that decisionmakers may choose to inflict such harm, for perfectly good reasons. Rather, NEPA is designed to influence the decisionmaking process; its aim is to make governmental officials notice environmental considerations and take them into account. Thus, when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered. NEPA in this sense differs from substantive environmental statutes, such as the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq. The Federal Water Pollution Control Act focuses upon the "integrity of the Nation's Waters, not the permit process," *Weinberger v. Romero-Barcelo,* 456 U.S. at 314. NEPA does the converse. Moreover, to set aside the agency's action at a later date will not necessarily undo harm. The agency as well as private parties may well have become committed to the previously chosen course of action, and new information—a new EIS—may bring about a new decision, but it is that much less likely to bring about a different one. It is far easier to influence an initial choice than to change a mind already made up.

Massachusetts v. Watt, 716 F.2d 946, 952 (1st Cir. 1983).

Hodel suggests that because the Senate report on ANILCA states that a proposed action may proceed after

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(1985). It is particularly inappropriate to approve of the lawless conduct when the violator is a federal agency. *See e.g.,* Executive Order No. 11514 (federal agencies are to "provide leadership in protecting and enhancing the quality of the Nation's environment . . .").

a section 810 evaluation, even though its effects are adverse to subsistence uses, Congress could not have intended that section 810(a)'s procedures always precede decision-making. Brief of Hodel at 23, n.13. But the fact that Congress chose not to dictate substantive results does not suggest that Congress would acquiesce in *post hoc*, formalistic procedural compliance. Quite the opposite. To the extent Congress has relinquished control over substantive outcomes, the need for strict compliance with the procedural safeguards accompanying the delegation of power is heightened. *See* part II of this brief, *infra*.

C. Section 810(a) Of ANILCA Is Not Analogous To Section 402 Of The Clean Water Act

In *Weinberger v. Romero-Barcelo*, this Court concluded that federal courts are not compelled to issue injunctions against federal agencies who violate the permit requirements of section 402 of the Clean Water Act, 33 U.S.C. § 1342. 456 U.S. at 320. In concluding that Congress had not intended in section 402 to limit the equitable discretion of courts, the Court stressed three factors—none of those three factors is present in the instant case.

First, the Court found that injunctions were not the only method of enforcing the permit requirements of section 402. 456 U.S. at 314. In addition to providing for injunctive relief, the Act provided for fines and penalties to be imposed as a means of achieving the goals of the Act. *Id.* In contrast, ANILCA provides no system of fines or penalties to impose upon federal agencies who violate the nondiscretionary duty imposed by section 810(a).[6] Injunctive relief is the only means of ensuring compliance.

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6. The Clean Water Act's federal facilities provisions, 33 U.S.C. § 1323, subject federal agencies to the same regulatory

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Second, the Court found that the purpose of the Clean Water Act was to insure clean water for the nation, and the permit process was simply a means of achieving that goal. 456 U.S. at 314. Since the particular discharge at issue apparently did not pollute the water (456 U.S. at 315), and since the lower court had ordered the federal defendant to obtain a permit (*id.*), the Court found that the lower court's denial of injunctive relief was not contrary to the purposes of the Act.

In the instant case the purpose of section 810(a) of ANILCA is to require the Secretary, in exercising delegated powers, to evaluate the impacts of oil exploration and development on subsistence uses of the public lands and provide notices, hearings, and findings *prior to* allowing leasing to occur. The Secretary cannot comply with section 810(a) once a lease has been completed. The legislative history of section 810(a) confirms its plain language. Congress intended that "until the requirements of . . . section [810] have been satisfied the proposed action *may not* proceed." S. Rep. 96-413, at 234 (emphasis added). Pre-decision consideration is the *raison d'etre* of section 810(a), and allowing *post hoc* compliance, or no compliance, is unquestionably contrary to the purposes of section 810.

Finally, this Court in *Weinberger* found that Congress did not envision that all pollution would be halted immediately, but rather envisioned a period of "phased compliance," in which the economic and environmental impacts of reducing pollution could be weighed on a case-by-case

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requirements as private citizens, essentially treating agencies as citizens when they pollute water. In contrast, section 810(a) is directed at agencies *qua* agencies, and reflects Congress' determination to control how those agencies exercise delegated powers.

basis. 456 U.S. at 316-17. The exercise of judicial equitable discretion was consistent with the phased compliance scheme of the Clean Water Act. No equivalent phased compliance scheme exists under ANILCA. Section 810(a) makes clear that compliance must occur prior to making any decision to lease.

Amoco argues that a number of lower court opinions apply *Weinberger* "broadly," and urges this Court to follow suit. Brief of Amoco at 44-45. But a close examination of the opinions cited by Amoco reveals that, while those courts cited *Weinberger* for the proposition that courts retain broad discretion to excuse statutory violations, they have *applied* that discretion to withhold injunctive relief only in cases where agency compliance was likely to occur in the absence of an injunction.[7]

II

REFUSING TO ENFORCE A NONDISCRETIONARY DUTY IS CONTRARY TO THE DOCTRINES OF SEPARATION OF POWERS AND CHECKS AND BALANCES

There are significant constitutional aspects to the injury created by agency violations of nondiscretionary procedural obligations. When Congress imposes on Executive branch agencies a nondiscretionary duty to follow specified procedures while exercising delegated powers,

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7. *See e.g., Alaska v. Andrus*, 580 F.2d 465, 486 (D.C. Cir.) *vacated in part on other grounds sub nom.; Western Oil & Gas Ass'n v. Alaska*, 439 U.S. 922 (1978) (injunction not necessary to preserve opportunity to choose among alternatives). *See generally* Z. Plater, *Statutory Violations and Equitable Discretion*, 70 Cal. L. Rev. 524 (1982) (reviewing cases in which courts have declined to issue injunctions against statutory violations because compliance would occur without the injunction).

courts have a constitutional obligation to enforce such duties. Agency violations of nondiscretionary duties involve clear derelictions of the Executive branch's obligations to execute the laws of Congress. In enforcing such duties the Court must be sensitive to its constitutional role, as well as the constitutional roles of the Executive and Legislative branches. The Court exceeds the bounds of its judicial role if it second-guesses the propriety of applying Congressional controls on delegated agency powers. This Court has concluded that broad delegations of power to Executive branch agencies are constitutional only *if* they contain appropriate standards or controls for the exercise of such power.[8] For courts to decline to enforce such controls raises the very constitutional concerns the Court has expressed about the initial delegations. When a federal agency is the defendant in a case involving violations of a nondiscretionary duty, a refusal to enjoin the violation is an abdication of the Court's role in the constitutional system of checks and balances and allows irreparable injury to the Constitution's allocation of federal power.

A. Federal Courts Must Enforce Procedural Safeguards Imposed By Congress To Maintain The Separation Of Powers

This Court has recently emphasized the importance of Congressional control over the exercise of delegated powers in maintaining the separation of powers envi-

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8. *See e.g., American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 543 (Rehnquist, J., dissenting); *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980) (stressing the importance of adequate controls on the exercise of delegated powers); *Yakus v. United States*, 321 U.S. 414 (1944) (delegated price control authority constitutional because accompanied by sufficiently clear standards established by Congress).

sioned by the Constitution. *See Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 646 (1980) ("sweeping delegation[s] of legislative power" violate separation of powers principles). When Congress imposes nondiscretionary procedural duties, judicial enforcement of controls on delegated power is particularly important. Congress in such statutes expresses its deepest concern for the proper exercise of delegated powers, and includes the word "shall" rather than "may" because it means to brook no exceptions. *See e.g., Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1970) (agency did not have discretion to ignore Congressional direction that agencies "shall" not approve any program affecting parklands unless specific criteria are present—Court enjoined action pending compliance with procedures). Nondiscretionary language is important because it plainly marks the division between legislative and executive power. If courts erase that line by refusing to enforce nondiscretionary duties, they contribute to an irreparable injury with constitutional implications—an erosion of the basic principle of separation of federal powers.

B. The Constitution's System Of Checks And Balances Requires The Judiciary To Insure Executive Compliance With Legislative Directives

Judicial decisions not to enforce agency nondiscretionary duties imposed by Congress also violate the constitutional principle of checks and balances. When courts elect not to enjoin statutory violations of *regulatory* statutes (which are essentially the same whether the regulated entity is a federal facility or a private party), that raises concerns about the separation of powers and whether the *court* is fulfilling its law-enforcing role. When courts are presented with agency violations of nondiscretionary

duties, that triggers the Court's additional obligation to check the unauthorized exercise of power by a coordinate branch of the federal government. The drafters of the Constitution determined that: "[The] three branches [of the federal government] should be rendered interdependent by giving each other a 'partial agency, or control,' over the other branches, securing in that way an equilibrium of governmental powers. This achieved a novel mixture of the doctrine of separation of powers with the doctrine of checks and balances." Panagopoulos, *Essays on the History and Meaning of Checks and Balances*, 174-75 (Univ. Press of America 1985). An important aspect of the Court's role in checking the power of its sister branches is its review of Executive branch actions to insure that they comply with constitutionally imposed legislative commands. "The courts have . . . traditionally exercised a reviewing function to ensure executive compliance with applicable public law, policing executive officers' obedience to legislative commands and providing a further set of internal checks on governmental power used against the citizenry." Breyer and Stewart, *Administrative Law and Regulatory Policy* 42 (Little, Brown, and Co. 1985). When agencies refuse to comply with nondiscretionary obligations imposed by Congress, courts are the only practical forum for remedying such violations. If the courts do not restrain such abuses, they will go unchecked.

While the tension between the courts' traditional balancing of equities and their role in the constitutional system of checks and balances may (as in *Weinberger, supra*) be resolved in favor of the courts' equity power when the exercise of judicial discretion is consistent with a statutory scheme, the courts' role as a check on Executive power must predominate when the courts are faced with a viola-

tion by an Executive branch agency of a nondiscretionary duty imposed by Congress and intended to guide the exercise of delegated power.

III

PETITIONERS HAVE NOT DEMONSTRATED THAT THE COURT OF APPEALS ABUSED ITS DISCRETION BY REQUIRING AN INJUNCTION IN THIS CASE

A. Petitioners Have Not Accurately Analyzed The Language And Purpose Of Section 810(a)

Petitioners argue that the court of appeals' opinion in this case is contrary to this Court's opinion in *Weinberger*. Brief of Hodel at 17; brief of Amoco at 44-46. Petitioner Amoco, however, misapplies *Weinberger* by simply iterating the general rule that Congressional intent to restrict equitable discretion will not lightly be implied. Amoco does not, as *Weinberger* requires, analyze section 810(a) to determine whether the specific language and purpose of that provision limits the courts' equitable discretion.

Petitioner Hodel argues that there is no "clear indication" that Congress intended through section 810 to limit the traditional equitable discretion of the courts, because the language of section 810 "does not address the distinct issue whether a district court must award certain relief. . . ." Brief of Hodel at 22. But Congress need not directly address the issue of judicial discretion in order to limit the courts' exercise of equitable powers. As this Court found in *TVA v. Hill, supra,* the nondiscretionary language of an Act may limit the courts' discretion, even though the statute does not expressly address the issue of equitable discretion. The Court drew the "necessary inference" from the language and purpose of the ESA that

Congress intended to limit the courts' equitable discretion. 437 U.S. at 194. The same inference is compelled by the nondiscretionary language of section 810; Congress did not intend to brook exceptions—administrative *or* judicial.

B. Section 810(a) Compliance May Not Occur Subsequent To Leasing

Hodel argues that an injunction is not necessary in this case because, according to Hodel, compliance with the procedural requirements of section 810 may occur subsequent to leasing but prior to development and production.[9] Brief of Hodel at 24. There are three problems with Hodel's argument.

First, it ignores the plain language of § 810, which requires that evaluation of impacts on subsistence uses take place "[i]*n* determining whether to . . . lease. . . ." 16 U.S.C. § 3120(a) (emphasis added). This language anticipates by its terms that evaluation will precede leasing. Furthermore, the Secretary must determine the size

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9. Petitioners also imply (but do not assert) that there is a statutory conflict between the procedures required by section 810(a) and the provisions of OCSLA governing oil and gas leasing. No such conflict exists. OCSLA is not a single purpose statute; it contains numerous requirements intended to protect the environment. *See, e.g.*, 43 U.S.C. § 1346. If a potential conflict existed, any ambiguities in statutory language would have to be resolved in favor of a construction that accommodates both statutes. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) ("where two statutes are 'capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective,'" quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). Additionally, ANILCA was adopted subsequent to OCSLA, and Congress must be presumed to have been aware of OCSLA's provisions and to have interpreted those provisions as compatible with section 810(a) of ANILCA. *See Director v. Perini North River Associates*, 459 U.S. 297, 319 (1983) (when interpreting statutes, courts "may presume 'that our elected representatives, like other citizens, know the law,'" quoting *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979)).

of an area to be leased prior to leasing. 43 U.S.C. § 1344(a). Section 810(a)(3)(B) of ANILCA requires that if leasing will restrict subsistence uses, the Secretary must insure that "the proposed [leasing] will involve the minimal amount of public lands necessary to accomplish the purposes of such [leasing]. . ." It would be impossible for the Secretary to reduce the size of lease sale areas in order to minimize impacts on subsistence uses if the evaluation of impacts occurs only after the lease sale has been held.

Second, post-lease consideration cannot fully account for subsistence uses unless the Secretary has the authority to withdraw leased tracts from production if he finds subsistence uses will be affected. The only bases for withdrawing or canceling a lease under the OCSLA, however, are: 1) if the lessee fails to comply with the OCS Lands Act, as amended, or any provisions of the lease or regulations issued under the Act (43 U.S.C. § 1334(c) and (d)); or, 2) if activity on the lease a) would probably cause serious harm or damage to life, property, any mineral, to the national security or defense, or to the marine or coastal environment, b) the harm will not disappear or decrease to an acceptable extent within a reasonable period of time and c) the advantages of lease cancellation outweigh the advantages of continuing such lease (43 U.S.C. § 1334(a)(2)(A)). Subsistence impacts are not one of the stated grounds for lease cancellation.[10] Even if the Sec-

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10. Impacts on subsistence uses may or may not translate into damage to the environment. It is conceivable that, by making certain tracts available for production and not others in an attempt to minimize impacts on subsistence uses, the Secretary will cause *adverse* environmental impacts. (For example, allowing production close to shore or near some non-subsistence resource or critical habitat.) The Secretary is not statutorily authorized to minimize these subsistence impacts *post*-leasing. Such impacts may only be minimized *prior to* leasing.

retary could cancel a lease to protect subsistence uses, the Secretary would have to pay millions of dollars for each withdrawn tract. Lessees are entitled to compensation for lease cancellation under 43 U.S.C. § 1334(a)(2)(C). To buy back just one Alaskan OCS tract after it has been leased and explored could cost the government over $50 million: the bonus bid paid by the oil company (which for some Alaskan tracts exceeds $30 million), plus the lessee's cost of exploring that tract, which could amount to $15 to $20 million, plus interest. The Secretary's reluctance to protect subsistence uses will increase as the cost of such protection increases. Lease cancellation was intended as a last resort for reversing bad leasing decisions if impacts which were unforeseeable at the time of the lease sale subsequently became known. Lease cancellation was not intended to replace the need for a comprehensive assessment prior to making the initial decision to lease.[11]

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11. This conclusion is fully consistent with this Court's decision in *Secretary of the Interior v. California*, 464 U.S. 312 (1984). That case held that nothing that occurs at the lease sale stage "directly affects" the coastal zone so as to require a determination of consistency under the Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451, *et seq.* Two points distinguish *California* from this case. First, as the Court in *California* repeatedly emphasized, the CZMA itself provides states with power to veto leases at the exploration and production stages of offshore development as well as at the lease sale stage. ("The State can veto the [development and production] plan as 'inconsistent' [with its coastal management program]. . . . 43 U.S.C. § 1351(d) (1976 ed., Supp. III)." 464 U.S. at 340.) No corresponding post-lease cancellation authority exists under ANILCA. Second the Court's opinion in *Secretary v. California* rested in large part on "the lengthy, detailed and coordinated provisions of CZMA § 307(c)(3)(B), and OCSLA §§ 1344-1346 and 1351 . . ." 464 U.S. at 343. That detailed statutory coordination was a principal reason for the Court's conclusion that Congress intended to postpone consistency review to the later stages of OCS activities. There is no detailed coordination between ANILCA and OCSLA that would suggest an intent by Congress to defer ANILCA review to later stages.

Third, contrary to the federal petitioners' allegations, significant impacts on subsistence resources *can* occur during exploration, as the Ninth Circuit recognized in this case. "The by-products of oil and gas exploration such as potential oil spills, leakage, and noise pose the threat of disruption to subsistence economy sufficient to destroy irreparably the isolated and unique culture of the Native Alaskans." *Gambell II*, 774 F.2d at 1426. The dangers from exploratory activities arise from two sources: noise and oil spills. Noise attributable to airplanes, ships and other mechanized traffic could cause reductions in animal populations which form the basis of the tribe's subsistence economy. As the Final Environmental Impact Statement (FEIS) for Norton Sound indicates, such noise may reduce the populations of whales, seals, and walrus. Sale 57 FEIS at 167, 177-80, 184.

There is also a real risk that oil spills from exploratory drilling will harm subsistence uses. In Norton Sound, the industry has used conventional jack up rigs to drill exploratory wells. The Norton Sound FEIS states that faults and thermogenic gas, two hazards present in Norton Sound, pose extreme dangers for jack up rigs. FEIS at TABLE III.A.1.1. The threat of significant spills was illustrated when a drilling rig loaded with fuel nearly broke apart while it was being towed in Norton Sound during one of the sudden and violent storms that periodically sweep the Bering Sea. Anchorage Daily News, September 22, 1982, pg. 1.

Oil spills during exploration could prove devastating. For example, a large oil spill could destroy the walrus hauling areas near St. Lawrence Island in the Bering Sea off Alaska. Because the people of St. Lawrence Island depend on walrus for over 80 percent of their food, such a

spill could threaten the entire island with starvation. Little and Robbins, Technical Report No. 89 at 294, 334, 343-44.

Petitioners' argument that compliance with section 810(a) can occur subsequent to leasing and therefore no injunction is necessary is without merit.

IV

INJUNCTIVE RELIEF DOES NOT PUNISH THIRD PARTY BENEFICIARIES OF AGENCY REFUSALS TO PERFORM NONDISCRETIONARY DUTIES

Petitioner Amoco argues that injunctive relief in this case will not "deter" Interior's violation of section 810(a), but instead will simply punish or harm petitioner. Brief of Amoco at 37-38. Amoco's deterrence argument is based on the assumption that once the Secretary has made a decision, the Secretary's mind cannot be changed by directing that additional facts be considered. But of course if this assumption is adopted then injunctive relief for violation of *any* procedural obligation would be pointless. Congress assumed the opposite; that forcing agencies to consider impacts on subsistence uses, and provide notice and hearings on those impacts, may indeed change substantive decisions. Courts, including this Court, routinely order agencies to reconsider decisions and follow proper procedures in doing so. *See e.g., Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 420-21 (1970). If the mere fact that an agency has arrived at a decision is sufficient to conclude that further procedural steps would be useless, agencies would have an incentive to do that which Congress is attempting to prevent—rush to judgment with no concern for proper procedure and involvement of the public. An injunction against exploration prior to

section 810(a) compliance in this case will obviously "deter" the agency's violation in this case; *not* to enjoin the violation will encourage future violations.

Amoco's argument that an injunction "punishes" Amoco is simply a restatement of the "balance of the harms" aspect of injunctive relief. To the extent Amoco is harmed one could argue that it is also "punished," but that does not further the analysis. Amoco's true complaint is that it suffers a monetary loss[12] if leasing doesn't go forward, while "[p]laintiffs suffered no tangible injury by virtue of Interior's decision to issue Sale No. 57 and 83 leases without complying with ANILCA. . . ." Brief of Amoco at 47. But Amoco's point proves too much. The difficulty in quantifying the harm flowing from an agency's refusal to follow mandatory procedures increases the likelihood that "balancing of the harms" will become judicial policymaking. A court can speculate that the harm flowing from a procedural violation is as great or as small as the court desires. In more traditional cases courts are able to balance one quantifiable harm against another. If issuing an injunction would prevent $10 worth of harm but cause $25 worth of harm, for example, courts could be expected uniformly to deny injunctive relief. *See e.g., Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. App. 1970). As the values on either side of the equation become more

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12. This Court recently recognized: "Under the plain language of OCSLA [the Outer Continental Shelf Lands Act], the purchase of a lease entails no right to proceed with full exploration, development, or production . . . the lessee acquires only a priority in submitting plans to conduct those activities. If those plans, when ultimately submitted, are disapproved, no further exploration or development is permitted." 464 U.S. 312, 339 (1983). Since Amoco's lease plainly does not create any "right," it would be anomalous to find that Amoco's investments based upon the lease are sufficiently important to outweigh the value of a federal agency complying with an explicit directive from Congress.

difficult to quantify, however, the opportunity for courts to impose their own values, and the likelihood that different courts will reach different results in similar cases, increases. Fidelity to statutory directives becomes even more important in such circumstances.

The importance of procedural compliance should not turn upon the personal opinions of the court in which relief is sought, or the particular facts of individual cases. Speculation about relative benefits and costs is a value-laden legislative act—one that courts must avoid if a statutory command applies. The district court's opinion in this case illustrates the danger: the court "balanced" two competing policies—oil exploration and subsistence uses of the public lands, and made the policy choice that "the public interest favors continued oil exploration" (Pet. App. 43a) to the exclusion of procedures required by Congress. When *Congress* has determined that specific procedures should be followed, courts should not second guess the Congressional calculus. "In our constitutional system the commitment to the separation of powers is too fundamental for [courts] to preempt congressional action by judicially decreeing what accords with 'common sense and the public weal.'" 437 U.S. at 195.

CONCLUSION

The relief ordered by the Court of Appeals in this case was appropriate and should be affirmed.

Respectfully submitted,

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